

1990

Albert John and Angela Butterfield, as guardian and
parents of and on behalf of Tiffany Ruth Butterfield
v. David Okubo, Thomas Nichol and Holy Corss
Jordan Valley Hospital, John Does 1-5 : Brief in
Opposition to Certiorari

Utah Supreme Court

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DOCKET NO.

BRIEF

900272

IN THE SUPREME COURT OF UTAH

ALBERT JOHN and ANGELA
BUTTERFIELD, as guardian and
parents of and on behalf of
TIFFANY RUTH BUTTERFIELD,

Plaintiff/Petitioners

vs.

DAVID OKUBO, THOMAS NICHOL,
and HOLY CROSS JORDAN VALLEY
HOSPITAL, JOHN DOES 1-5,

Defendants/Respondents.

DC C86-9250
CA 880347-CA
SC **900272**

Priority No. 13

**RESPONDENT, HOLY CROSS JORDAN VALLEY HOSPITAL'S
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

Petition for Writ of Certiorari from an denial
of an appeal by the Utah Court of Appeals

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF UTAH

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CONTROLLING PROVISIONS

The procedure for this case is controlled by Rules 45, 46, 47, 48 and 49 of the Utah Rules of Appellate Procedure (1990). Full copies of said Rules are reproduced and attached to the addendum in the brief filed by respondent, Thomas Nickol.

STATEMENT OF THE CASE

This respondent adopts in its entirety the statement of the case set forth in the brief filed by the co-respondent, Dr. Thomas Nickol.

In addition to the statement of the case set forth in Nichol's brief, this defendant adds that the only claim made against this respondent in the Affidavit of Barry Jacobs is set forth in paragraph 8 wherein he claims that it is "alleged that the prior emergency room record of July 4, 1984, could not be obtained. Such data should have been available. This would have reenforced the fact that the unexplained respiratory problems existed and a differential diagnosis including SIDS should have been developed."

Neither the Affidavit of Dr. Jacobs nor the petitioner point to any evidence or foundation whatsoever for Dr. Jacobs' statement. The only evidence in this regard was developed during the deposition of Dr. Nickol on page 32, wherein it states:

Q. Should the hospital pull up prior records?

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RESPONDENT, HOLY CROSS JORDAN VALLEY HOSPITAL'S
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner's Petition comports with Rule 46 regarding considerations governing review of certiorari.
2. Whether the Court of Appeals properly affirmed the District Court's Order of Dismissal on the basis that petitioners failed to establish a prima facie case that Holy Cross Jordan Valley Hospital's conduct was a proximate cause of Tiffany Butterfield's death.

JURISDICTION

This Court has jurisdiction pursuant to UTAH CODE ANN.,
Section 78-2-2(5) (1989).

Anticipating that the petitioner will claim that the Court of Appeals' decision is in conflict with a decision of another panel of the Court of Appeals on the same issue of law, or that the Court of Appeals rendered a decision that departed from accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision. The other criteria set forth in Rule 46 does not seem to apply. If these are the arguments to be made by petitioner, petitioner has not set forth any such compelling reasons nor has petitioner cited any cases or pointed out to the Court any reason that the decision of the appellate court should be reversed. In fact, the appellate court merely affirmed the order of the trial court granting summary judgment in favor of respondents based on its failure to find that petitioners had supported with the necessary evidence a causal relationship between the alleged conduct of defendants and the death of Tiffany Butterfield.

POINT II

THE UTAH COURT OF APPEALS PROPERLY AFFIRMED THE LOWER COURT'S ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS.

With regard to respondent, Holy Cross Jordan Valley Hospital, the Affidavit of Dr. Barry Jacobs is totally and completely inadequate in making the causal link between the alleged failure of the hospital staff to have available prior medical records and the death of Tiffany Butterfield. Not only

A. I think it assists in patient care to have all information available. Again, I think there is a lot of individual and extenuating circumstances. But the usual situation at Holy Cross Jordan Valley was for the hospital to provide previous visit records, including in-patient records, if there had been any in-patient hospitalizations and care.

This line of questioning was never developed, nor was there any statement by Dr. Nichol that he needed the prior records to assess the situation in August, 1984, nor did he ever state that said "failure" of the hospital caused him to treat the patient any differently.

ARGUMENT

POINT I

PETITIONER'S PETITION DOES NOT COMPLY WITH ANY OF THE CONSIDERATIONS FOR REVIEW BY CERTIORARI AS SET FORTH IN RULE 46.

Rule 46 of the Utah Rules of Appellate Procedure states as a general principle that a writ of certiorari is not a matter of right, but of judicial discretion and will be granted only for special and important reasons. The Rule then sets forth four criteria which will be considered. The petitioner's brief does not refer to any of the four subparts of Rule 46. Respondent finds it difficult, therefore, to even respond to petitioner's brief. In fact, petitioner's brief does not even comply with Rule 49, Utah Rules of Appellate Procedure, in that it does not set forth a table of contents, a table of authorities, or even the questions presented for review, as required under Rule 49(4), Utah Rules of Appellate Procedure.

It is the plaintiff's burden to prove proximate causation.
Nixdorf v. Hicken, 612 P.2d 348 (Utah 1980); Hoopiiana v.
Intermountain Health Care, 740 P.2d 270 (1987).


CONCLUSION

The petitioners have failed to demonstrate in their Petition for Writ of Certiorari any compelling reason why their Writ should be granted. They have failed to comport with Rule 46 and Rule 49 of the Rules of Appellate Procedure.

The petitioners' brief fails to demonstrate any compelling reason why the trial court's order granting summary judgment should be overturned and fails to show any reason why the Court of Appeals' decision should be reversed. For these reasons, respondent Holy Cross Jordan Valley Hospital respectfully requests that this Court deny petitioners' Writ of Certiorari.

DATED this 5 day of July, 1990.

SNOW, CHRISTENSEN & MARTINEAU

By 
David W. Slagle
Attorneys for Respondent
Holy Cross Jordan Valley
Hospital

does the evidence fail to establish the appropriate standard of care for the hospital, it fails to establish a breach of that standard and, more importantly, fails to establish proximate cause. Tiffany Butterfield was first seen at Holy Cross Jordan Valley in July, 1984. There does not purport to be any claim that the hospital staff acted improperly during that visit. The second visit was in August, 1984, and the only claim is that they failed to have available for Dr. Nickol the prior emergency room record relating to the July visit. As set forth in the Statement of Facts which is included in the brief of Dr. Nickol, Dr. Nickol made a full and complete examination on that date, took a full history from Tiffany's parents, and treated Tiffany appropriately. This is the last time Dr. Nickol ever saw this child.

From August, 1984 through the date of Tiffany's death, Tiffany was treated and followed by Dr. Monte McClellan, a family practitioner. These visits occurred on August 31, 1984, September 27, November 5, November 30, and December 14, 1984. Tiffany died on December 20, 1984. The causal connection is never made between the alleged conduct of this respondent and Tiffany's death. As set forth by the Court of Appeals, there were clearly intervening acts which precluded finding proximate cause.

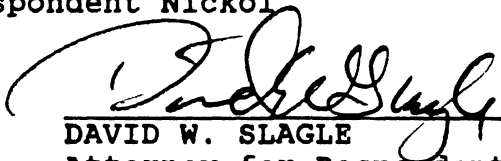
CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Holy Cross Jordan Valley Hospital's Brief in Opposition to Petition for Writ of Certiorari was served by placing four true and correct copies of the same to the following counsel of record by first class mail, postage prepaid, in the United States Mail at Salt Lake City, Utah, on the 5th day of July, 1990:

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